(25,808)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 978.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, PETITIONER,

vs.

STERLING LAND & INVESTMENT COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Page
Caption	*a*
Transcript of record from the district court of the United States for the western district of Kentucky	1
Petition for mandamus	1
Supplemental and amended petition	2
Amended petition	4
Answer	4
Exhibit "A"—Copy of order of the Taylor county court appointing W. O. Hendrickson special tax collector	7
Exhibit "B"—Copy of tax levy made by the fiscal court of Taylor county, Kentucky	8
Amended answer	9
Second amended answer	10
Demurrer to answer as amended	12
Opinion	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 16, 1917.

Page

Judgment granting mandamus 17
Assignment of errors 19
Bond on writ of error 21
Order allowing writ of error 22
Præcipe for transcript 23
Clerk's certificate 24
Petition for writ of error 24
Citation 25
Writ of error 25
Appearance of counsel 27
Motion to advance cause 27
Affidavit in support of motion to advance 28
Stipulation that causes be heard together 30
Order consolidating causes for hearing 31
Entry—Causes argued and submitted 31
Judgment 32
Opinion 33
Clerk's certificate 40
Writ of certiorari and return 41

No. 2951.

United States Circuit Court of Appeals Sixth Circuit

W. T. HENDRICKSON, JUDGE OF TAYLOR COUNTY COURT, AND J. D. JONES, W. H. BENNETT, A. W. MILLER, L. MORGAN, RUEL EADS AND T. E. WISE, JUSTICES OF THE PEACE OF TAYLOR COUNTY, KENTUCKY,

Plaintiffs in Error,

vs.

STERLING LAND AND INVESTMENT COMPANY,

Defendant in Error.

Error to the District Court of the United States for the Western District of Kentucky.

RECORD

Original transcript filed July 24, 1916.

TRANSCRIPT OF RECORD.

In the District Court of the United States for the Western District of Kentucky, at Louisville.

W. T. Hendrickson et al., Plaintiffs-in-Error, vs. Sterling Land & Investment Company, Defendant-in-Error.

PETITION FOR MANDAMUS—Filed April 29, 1915.

Complainant states that heretofore, to wit, on the 31st day of March, 1914, it filed its petition, wherein it sought to recover $17,235.95, with interest from the 1st day of April, 1914, until paid; that certain proceedings were had thereon, with the result that a judgment was rendered for the complainant in the sum of $15,606.31, with interest from the 1st day of April, 1914, until paid; that execution fi fa was issued on the 3rd day of February, 1915, directed to the marshal of this court commanding him to make the amount of said judgment out of Taylor county; that the same was placed in the hands of the marshal for execution while in full force and effect; that on the 5th day of February, 1915, the marshal returned same in substance "No property found." Said judgment has never been set aside or reversed, and is now in full force and effect, and the same is wholly unpaid.

Complainant states that W. T. Hendricks—— is the duly elected and qualified judge of the Taylor county court, and that Ruel Eads, T. A. Wise, Jas. Jones, Asberry Miller, Wm. Bennett, John Henry Morgan are the duly elected and qualified justices of the peace, and that all of the said defendants together constitute the Fiscal Court of Taylor county; that it is the duty of said Fiscal Court to levy taxes for all county pudposes, which taxes consist of a pole tax on each male inhabitant of said county over twenty years of age, not exceeding $1.50, and an ad valorem tax on all property in said county subject to taxation therein.

That it is the duty of said county judge, acting as the county court, to appoint a collector of county taxes in case the sheriff failed to execute bond or qualify as provided by law, or in case of a vacancy in the office of sheriff for any other reason.

That the party elected to the office of sheriff has refused to qualify, and that there is now no sheriff for Taylor county.

That it has demanded payment of the said judgment by said county, and of the debts on which said judgment was rendered, but the county has refused, and still re-

fuses, to levy any tax, and the defendants have failed and refused, and will continue to refuse, to levy any tax or make any other provision for the payment of said judgment.

Wherefore, complainant prays the court to issue its writ of mandamus, commanding and requiring the defendants to levy a tax sufficient to pay said judgment, and for the purpose of paying the same; that they be required to include in the order making the levy for ordinary county purposes the levy for the aforesaid purpose; that the defendant, W. T. Hendricks, acting as the county court, be required to appoint a collector to collect said tax, and that said court be required to appoint the same collector for said tax that is appointed to collect the tax levied for regular county purposes, and that the said appointment to collect the said taxes for both of said purposes be made by and in the same order, and that the said court be ordered to require the said collector to execute one bond for the collection of all of said taxes; and that the complainant recover all costs expended herein; and it further prays for all general and proper relief.

Richards & Harris,
Attorneys for Complainant.

SUPPLEMENTAL AND AMENDED PETITION FOR MANDAMUS—Filed May 6, 1916.

Complainant states that heretofore, to wit, on the 31st day of March, 1914, it filed its petition herein, and since has recovered judgment as prayed for in the petition; and on the 29th day of April, 1915, it filed its petition for mandamus, and which mandamus has been confessed; and now for supplemental and amended petition, says

that in stating the names of the members of the Fiscal Court of Taylor county, it gave the name of T. A. Wise as a member and John Henry Morgan as a member of the Fiscal Court, when in fact it was T. E. Wise and L. Morgan, and it now asks that this error be corrected.

And for amendment to its prayer herein, prays as follows:

Wherefore, complainant prays the court to issue its writ of mandamus, commanding and requiring the defendants to levy a tax sufficient to pay said judgment and for the purpose of paying same; and that they be required to include in the order making the levy for ordinary county purposes, the aforesaid levy for the purpose of paying the aforesaid judgment; and to further direct the said W. T. Hendrickson, as county judge for Taylor county, that when he next appoints a collector whose duty it shall be to collect any or all items by a levy made by the Fiscal Court of Taylor county for any purpose, he shall embrace in said order of appointment a direction to the officer appointing, to collect both the levy made to pay this judgment and the levy made and to be made for any item which may be levied by said Fiscal Court, and that said county judge shall continue to so embrace said directions in the same order of appointment until a collector is appointed who shall qualify as such collector, and said county judge shall exact of him but one and a single bond to cover the collection of the levy made to pay this judgment, as aforesaid, and the item or items of any levy made by the Fiscal Court of Taylor county for any other purpose.

Plaintiff further prays that he recover from the defendants all of his costs herein expended, and for all other relief to which he may appear entitled.

Richards & Harris,
Attorneys for Plaintiff.

AMENDED PETITION—Filed May 29, 1916.

The plaintiff, by leave of court, amends its petition, or the prayer of its petition herein, and now prays that the court issue its writ of mandamus, commanding and requiring the defendants to levy a tax upon each one hundred dollars of property assessed for taxation in said county for the year 1916, sufficient to pay plaintiff's aforesaid judgment, interest and costs; and that the court further direct the said W. T. Hendrickson, as county judge of Taylor county, that when he next appoints a collector whose duty it shall be to collect any or all items of any levy made by the Fiscal Court of Taylor county for any purpose, he shall embrace in said order of appointment a direction to the officer appointed to collect both the levy made to pay this judgment and the levy made or to be made for any item which may be levied by said Fiscal Court, and that said county judge shall continue to so embrace such directions in the same order of appointment until a collector is appointed who shall qualify as such collector by executing bond, and said county judge shall exact of him but one and a single bond to pay the levy made to pay this judgment as aforesaid, and the item or items of any levy made by the Fiscal Court of Taylor county for any other purpose.

It further prays that it recover from the defendants all of its costs herein expended, and for all other relief to which it may appear entitled.

Richards & Harris.
Attorneys for Complainant.

ANSWER—Filed May 29, 1916.

Defendants, for answer to the petition herein, say:

That prior to the institution of this action, to wit, on January 24, 1916, the county court of Taylor county appointed W. O. Hendrickson collector of state taxes for Taylor county for the year 1916, it having been made to appear to the court that the office of sheriff was vacant,

and that one J. A. Sanders, who had been appointed by the court as sheriff of Taylor county, had refused to qualify as such.

Subsequent to the appointment of said Hendrickson as state tax collector, he, on January 27, 1916, duly qualified as such by executing bond as required by law. A duly attested copy of the order of the Taylor county court appointing said Hendrickson, and showing his qualification aforesaid, is filed herewith as part hereof, marked "Exhibit A."

Prior to the institution of this action, to wit, on April 6, 1916, the Fiscal Court of Taylor county made a levy of taxes for the year 1916 upon all property subject to taxation in Taylor county in the following terms, to wit:

> "For the purpose of paying the claims allowed by the Fiscal Court of Taylor county at its October Term, 1915, and at its April Term, 1916, and the claims allowed by the county judge for the fiscal year 1916, being for the current and necessary expenses for said state county business. It is ordered by the court that there be, and there is hereby, levied an ad valorem tax of fifty cents of each one hundred dollars worth of taxable property as assessed and equalized for taxation for the year 1916, for state county purposes, and a state county poll tax of one dollar and fifty cents on each poll residing in Taylor county as assessed for the year 1916. This amount, when collected, to be apportioned as follows:
>
> Ten cents on each one hundred dollars as assessed and equalized for taxation along with the state county poll tax of one dollar and fifty cents be used for paying the salaries of the county officials and the incidental expenses for the year 1916. And that five cents on each one hundred dollars worth of taxable property as assessed and equalized for taxation for the year 1916, be used for paying off the pauper claims for the aforesaid year. And that thirty-five cents on each one hundred dollars, as assessed and equalized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor county for the year 1916. Four thousand, six hundred dollars ($4,600.00) be used in connection with like sum from state for the purpose of continuing the ——— on the state roads in the aforesaid county, which are now under construction.

Answer.

It is further ordered by the court that there be, and there is hereby, levied an ad valorem tax of twenty cents on each one hundred dollars worth of taxable property of Taylor county, as assessed and equalized for taxation for the year 1916, and a poll tax of one dollar on each poll in Taylor county as returned by the Assessor for the year 1916, for the purpose of maintaining and equiping the common schools for the year 1916."

A duly attested copy of the order of said Fiscal Court, making said levy, is filed herewith as part hereof, marked "Exhibit B."

Defendants further say that under the Statutes of Kentucky, as construed by the Court of Appeals of Kentucky, the Country Court of Taylor county has a discretion as to whether it will appoint one person to collect all moneys due the state and the county, and taxing districts therein, or as to whether it will appoint separate collectors and designate in the order of appointment of each collector what he shall collect, including the right and discretion to appoint one collector to collect taxes levied by the Fiscal Court of the county for ordinary county purposes, and another collector to collect taxes levied by the Fiscal Court for other purposes, such as the payments of judgments against the county, and to direct in each order of appointment what taxes the appointee thereunder shall collect, and for the collection of which he should be required to give bond. And they respectfully submit that this Honorable Court cannot, by its judgment, control the aforesaid discretion of the County Court of Taylor county, given it by the Statutes of Kentucky as construed by the Court of Appeals of Kentucky.

Jeff. Henry,
Abel Hardin,
Bruce and Bullitt,
Attorneys for Defendants.

Defendant, W. T. Hendrickson, being duly sworn, says he is one of the defendants in the above styled case, and that the statements of the foregoing answer are true.

W. T. Hendrickson.

Subscribed and sworn to before me by W. T. Hendrickson this 26 day of May, 1916.

My commission expires Feby. 16, 1920.

[Seal] M. W. Tucker,

Answer.

Exhibit A.

Notary Public, Taylor County, Kentucky.

At a special term of the Taylor county, commenced and held at the court house in Campbellsville, Ky., on the 24th day of January, 1916.

Present: the Hon. W. T. Hendrickson, Judge.

It apearing to the court that office of sheriff is vacant in Taylor county, and that on the 10th day of January, 1916, the court appointed J. A. Sanders as sheriff of Taylor county, Kentucky, and that on the 15th day of January, 1916, that said Sanders failed and refused to qualify, and that on account of the failure of said Sanders to qualify as sheriff, and there being no tax collector in Taylor county, Kentucky, for the collection of the state tax for the year 1916. It is now ordered by the court that W. O. Hendrickson be, and he is hereby, appointed state tax collector for Taylor county, Kentucky, for the year 1916, and before he shall collect said tax, he will execute bond according to law, conditioned that he will only collect state taxes.

Ordered that court adjourn until court in course.

W. T. Hendrickson, J. T. C. C.

At a special term of the Taylor County Court, commenced and held at the court house in Campbellsville, Ky., on the 27th day of January, 1916.

Present: the Hon. W. T. Hendrickson, Judge.

This day came W. O. Hendrickson, special tax collector of Taylor county, and open court, produced his quietus for the state revenue for the year 1915.

Thereupon said W. O. Hendrickson, special collector aforesaid, with the Maryland Casualty Company of Baltimore, Maryland, his sureties, executed to the commonwealth of Kentucky a bond for the collection and payment of the state revenue for the year 1916, which bond is in words and figures as follows,

Sheriffs Bond for State Revenue.

We, W. O. Hendrickson, special collector of Taylor county, and Maryland Casualty Company, of Baltimore, Maryland, his sureties, bind and obligate ourselves jointly and severally to the commonwealth of Kentucky in the penal sum of fifteen thousand dollars ($15,000.) that W. O. Hendrickson, special tax collector shall faithfully perform his duties.

Witness our signature this the 27th day of January, 1916.

W. O. Hendrickson,

Maryland Casualty Company,

By C. W. Jefferson,

Attorney-in-fact.

Answer.

State of Kentucky, County of Taylor, set:

I, C. W. Ramsey, clerk of the county and state aforesaid, do hereby certify that foregoing is a true and correct copies of the order appointing W. O. Hendrickson special tax collector of Taylor county for the year 1916, together with his qualification and bond, said orders and bond being duly recorded in order book No. 9, pages 618 and 619 of the records of the Taylor county clerks office.

Witness my hand this the 29th day of May, 1916.

C. W. Ramsey,
Clerk of the Taylor County Court.

Exhibit B.

April Term, 6th Day of April, 1916.

Court met pursuant to anjournment at the court house in Campbellsville, Ky., on the 6th day of April, 1916.

Present: the Hon. W. T. Hendrickson, presiding judge of the Taylor County Fiscal Court, togather with the following Justices, W. H. Bennett, J. D. Jones, Jr., Lewis Morgan, A. W. Miller, Ruel Eades and T. A. Wise. For the purpose of paying the claims allowed by the Fiscal Court of Taylor county in its October Term, 1915, and at its April Term, 1916, and the claims allowed by the county judge for the fiscal year 1916, being for the current and necessary expenses for said state county business.

It is ordered by the court that there be, and there is hereby, levied an ad valorem tax of fifty cents of each one hundred dollars worth of taxable property, as assessed and equealized for taxation for the year 1916, for state county purposes, and a state county poll tax of one dollar and fifty cents on each poll residing in Taylor county as assessed for the year 1916, this amount when collected to be apportioned as follows:

Ten cents on each one hundred dollars as assessed and equealized for taxation along with the state county poll tax of one dollar and fifty cents be used for paying the saleries of the county officials and the incidental expenses for the year 1916, and that five cents on each one hundred dollars worth of taxable property as assessed and equealized for taxation for the year 1916, be used for paying off the pauper claims for the aforesaid year, and that thirty-five cents on each one hundred dollars as assessed and equealized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor county for the year 1916, four thousand six hundred dollars ($4600.00) be used in connection with like sum from the state for the purpose of continuing

the work on the state roads in the aforesaid county, which are now under construction. It is further ordered by the court that there be, and there is hereby, levied an ad valorem tax of twenty cents on each one hundred dollars worth of taxable property of Taylor county as assessed and equealized for taxation for the year 1916, and a poll tax of one dollar on each poll in Taylor county as returned by the assessor for the year 1916, for the purpose of maintaining and equiping the common schools for the year 1916.

State of Kentucky, County of Taylor, set:

I, C. W. Ramsey, clerk of the state and county aforesaid, do hereby certify that the above is a true and correct copy of the levy made by the Fiscal Court of Taylor county, Kentucky, on the 6th day of April, for the fiscal year of 1916. The foregoing levy being duly recorded in order book No. 2, page 410 of the records of the Taylor county clerk's office.

Witness my hand this the 20th, 1916.

C. W. Ramsey,
Clerk of the Taylor County Court.

AMENDED ANSWER.—Filed May 29, 1916.

Defendants, for amendment to their answer herein, say that the county of Taylor has heretofore entered upon, and is still, continuing the work of constructing and improving public roads in Taylor county known as "State Aid Roads," pursuant to provisions of Sect. 4356x of the Kentucky Statutes, being an act entitled "An Act to create and establish a system of public state roads, and to provide for the construction and maintenance thereof, and which was approved on the 24th day of March, 1914, being roads which, when completed,

will connect county seats of Taylor with the county seats of the other counties. That said work began during the year 1915, and is still continuing. That Taylor county contributed moneys in the year 1915 for said work, and the state of Kentucky contributed an equal amount for the same, and that for the year 1916, Taylor county, as shown by the Fiscal Court order of April 6, 1916, to wit, Exhibit B with the answer herein, expects to contribute during the year 1916, $4,600.00 toward the cost of said work, which amount was appropriated by said order, and will be entitled to receive from the state of Kentucky an equal amount as a contribution toward the payment for said work. And said work has thus far been done, and is being done, and is required by said statute to be done under the direct supervision and control of the state of Kentucky.

Bruce and Bullitt.

SECOND AMENDED ANSWER.—Filed May 29, 1916.

Defendants, for further answer herein, say that the construction and improvement of public roads in Taylor county known as State Aid Roads, and which Taylor county has begun, as stated in the first amended answer herein, is work which has been done and in continued not only under the provisions of Sect. 4356x of the Kentucky Statutes, being an act entitled "An act to create and establish a system of public state roads and to provide for the construction and maintenance thereof," approved March 24, 1914, but also under the provisions of Sect. 4356w of the Kentucky Statutes, being an act entitled "An act declaring certain public roads a system of public state highways, and public works of the state of Kentucky," approved March 24, 1914. And they further say that the Fiscal Court did heretofore, in the year 1915, pass a resolution stating that the public

interest demanded the improvement of three roads, to wit:

(1) The Spurlington road from Campbellsville, the county seat of Taylor county, to the boundary line between Taylor and Marion counties, being the road from Campbellsville to Lebanon, thus connecting the county seats of Taylor and Marion counties; and,

(2) The Greensburg road from Campbellsville to the boundary line between Taylor and Green counties, being the road from Campbellsville to Greensburg, thus connecting the county seat of Green county, and

(3) The Saloma road from Campbellsville to the boundary line between Taylor and Larue counties, being the road connecting Campbellsville and Hodgenville, the respective county seats of Taylor and Larue counties; and did request that said roads be constructed as provided in the legislative acts aforesaid, and did in said resolution describe said roads to be constructed. And they further say that the Fiscal Court, after the passage of said resolution, did cause a survey of said roads to be made, with plans, profiles and specifications of the work as provided by said statutes, and same were submitted to the Fiscal Court of said county with an estimate of the cost of the work, and were approved by said court and were then submitted to the state commissioner of public roads of Kentucky for his approval or rejection, and were approved by him; and work was begun upon said roads in accordance with said plans and specifications, in the year 1915, and on account of such work, Taylor county contributed two thousand ($2,000.00) dollars, and the state of Kentucky contributed two thousand ($2,000.00) dollars.

Said work, however, upon said road was not completed in the year 1915, but is to be continued during the year 1916, and Taylor county has, as shown by the order of its Fiscal Court, a copy of which has heretofore been filed, appropriated forty-six hundred ($4,600.00) dollars to be applied on account of the cost of constructing said three roads, and has applied to the state of Kentucky, in accordance with the provisions of the act aforesaid, to contribute an equal amount, to wit: Forty-six hundred ($4,600.00) dollars; and the state of Kentucky has agreed to do so upon the payment by Taylor county of the forty-six hundred ($4,600.00) dollars, which it has agreed to contribute.

Defendants further say that, in accordance with the provisions of the legislative acts aforesaid, the commissioner of public roads has established rules and regula-

tions regulating the construction and improvement of roads under said legislative acts, and Taylor county has in all respects complied with said rules and regulations, and with the provisions of said statutes; and, as aforesaid, the said construction work upon said three roads has been begun and is in progress, but has not been completed.

Defendants further say that the total assessed value of property in Taylor county for the year 1916 is about two million, one hundred thousand ($2,100,000.00) dollars; and that the forty-six hundred ($4,600.00) dollars appropriated by said order of the Fiscal Court as Taylor county's contribution towards the construction of said three state aid roads is very considerably more than one-half of the total amount that will be raised under said Fiscal Court's 35-cent levy for the roads and bridges for the year 1916, if all of said levy should be collected.

Wherefore, defendants pray to be hence dismissed, and for their costs.

Jeff. Henry,
Abel Hardin,
Bruce and Bullit,
Counsel for Defendants.

W. T. Hendrickson says he is one of the defendants in the above styled action, and that the statements of the foregoing amended pleading are true.

W. T. Hendrickson.

Subscribed and sworn to before me by W. T. Hendrickson this 29 day of May, 1916.

My commission expires January 29, 1920.

Katherine Arnett,
Notary Public, Jefferson Co., Ky.

DEMURRER—Filed May 29, 1916.

Comes the plaintiff and demurs to the answer and amended answer of W. T. Hendrickson etc., because it does not state facts sufficient to constitute or support a defense.

Richards and Harris and
Lewis Apperson,
Attorneys for Plaintiffs.

OPINION.—Filed May 29, 1916, Walter Evans, Judge.

The plaintiff's demurrer to the defendant's answer raises questions which we have often considered and decided in the course of the many years of litigation growing out of the bonded indebtedness of Green and Taylor counties, respectively, incurred by each in aid of the construction of a certain railroad. The indebtedness of both counties is alike; it grew out of the same railroad situation and similar legislation, and the character of the resistance made by each county against the payment of the debts has been the same. We have, therefore, quite a settled jurisprudence in this connection, at least so far as this court is concerned.

The validity of the indebtedness must be regarded as having been settled by the decision of the Supreme Court in Greene County v. Quinlan, 211 U. S., 582.

The routine steps taken in resisting payment after the validity of the indebtedness has been settled by the decision of the Supreme Court have been practically uniform and as follows:

First—A contest upon the validity of the bonds being hopeless, the first resistance appears when a writ of mandamus is applied for, requiring the Fiscal Court to make a levy of taxation to pay the debt.

Second—Failing to prevent the writ of mandamus, and after the taxation has been levied and proceedings for its collection have begun by putting or trying to put tax books in the hands of the sheriff, that officer either refuses to qualify, or, having qualified, resigns.

Third—A collector of state taxes is then appointed separately, which, under the law of Kentucky, is admissible.

Fourth—A collector of county taxes is then appointed, who usually refuses to accept the office if he is required to collect taxation to pay the railroad debts at the same time and under the same bond taken from him for the collection of the other county taxation, or he resigns if that requirement is made after he has qualified.

This brings the creditor to a standstill. It was perceived, however, that the county could not collect taxes for paying its other liabilities, especially the taxes necessary to pay the salaries of its officers unless a collector should be appointed, and so an attempt became customary to place all the assessments for county purposes in the hands of the collector, except that which levied taxes for the payment of the railroad bonds, and a creditor owning those bonds would find it impossible to obtain a result favorable to himself if he could not have the taxation for his benefit levied and collected simultaneously with the other taxation by the collector, and as we thought

one county debt was as sacred as another, we enforced the Kentucky statute. The county officers who wanted their salaries paid usually found that they could be elected more easily if they opposed the payment of the bonded indebtedness. Their appeal to the spirit which demanded a repudiation of the bonded indebtedness usually secured them popular favor, and it was very plain that if the taxes for the salaries of the officers and taxes for the payment of the ordinary county expenses could all be collected, and those necessary to pay the railroad bonds could be left out, things would move quite satisfactorily to those who desired to repudiate the county's bonded indebtedness. We did not concur in this plan, and concluded that this state of case should not be tolerated, inasmuch as the bonded indebtedness has been found by the Supreme Court to be a valid one. So it became our habit, under Section 4131 of the Kentucky statutes, to require the County or Fiscal Court, whichever had control of the matter, to make an assessment covering all, and to require that the collector, under such circumstances, should collect all alike, or else collect none, and in order to accomplish this, our writs of mandamus would require that there should be exacted from any sheriff or collector who collected county taxation a bond which would include alike an obligation to collect the levy for the railroad bonded indebtedness and the taxation for ordinary county expenses, including salaries of officers. In this way, and in this way only, could the creditors who held the bonds of the county have anything but a mere nominal remedy. Without such a requirement the Collector would collect money to cover all the other county expenses, and its officers who got their salaries might laugh at such of its creditors as had taken its bonds. The proper local court was also required, when appointing a collector of county taxes, to make his appointment cover all alike.

Section 4131 of the Kentucky Statutes provided a remedy to meet this situation, and in several instances in the course of this litigation we have heretofore endeavored to enforce that remedy in the way indicated.

The Court of Appeals in Commonwealth, etc., v. Wade's Admr., etc. 126 Ky., 791, had construed that section, and in our proceedings we have followed that construction. It afforded a good remedy for the creditors who held the county's bonds. But at the instance of the two counties named, the legislature of the state in 1906, (Sess. Acts 1906) amended Section 4131 by adding thereto the following words: "But such collector shall only

be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

In Commonwealth, etc., v. Moody, 150 Ky., 571, the Court of Appeals upheld the amendment. In this case we are asked to accept and to follow that construction. We have been asked heretofore to do so, and have declined, and must again decline upon ground similar to those controlling us in previous cases, though if the amendment to Section 4131 of the Kentucky Statutes is to be applied only to debts which arise in the future, we see no reason why it might not be enforcible as to them. But as to any indebtedness which existed prior to the amendment of 1906, as the indebtedness in this case did, we must disregard that amendment and will briefly state our reasons for this conclusion:

The meaning of the language of a state constitution or a state statute, as ascertained by decisions of the court of last resort of that state, is always accepted by the Federal Courts as binding upon them. So are decisions of such courts as to the validity of state legislation under the provisions of the state constitution. But the Federal Courts are not bound by the decisions of any of the state courts as to the validity of a state statute, if the validity of such statute is challenged upon the ground that it is violative of the Constitution of the United States. These propositions are so familiar as to require no citation of authorities.

The Federal Constitution forbids a state to enact any law which impairs the obligation of a contract. The remedy for enforcing the contract is essentially a part of the contract itself. If a remedy is provided when the contract is created, it may indeed be changed, but only on condition that one equally efficient and equally available is substituted. In this instance the amendment to Section 4131 of the Kentucky Statutes took away the only efficient remedy left the holder of any of the bonds of Taylor county, and instead of providing another equally efficient, left those creditors helpless, or at least dependent upon the caprice of the County Court. It is so plain that this cannot be constitutionally done that we have felt constrained to hold that the creditors who held the railroad bonds of the county were entitled to the remedy as it existed previous to the passage of the amendement of 1906, and especially as Section 4131 which gave that remedy had been upheld in Commonwealth etc., v. Wade's Admr., 126 Ky., above referred to, which

was decided in 1907, but in an action which arose before 1906.

Of course, school taxes (which the Kentucky Court of Appeals has held to be state taxes) will not be affected by this ruling, but will be excepted from it, as will be shown in the judgment herein.

It is insisted that the road taxation provided for in the act approved March 24th, 1914, (Acts 1914, 441) is a state tax and stands upon the same footing as the school tax. So far as the taxation of 5 cents on the $100.00 provided for in Section 4 of that act is concerned, the contention is sound, and we cannot and shall not, by our judgment in this case, interfere with that taxation or its collection, but Section 21 of the same act provides that any road constructed or reconstructed under its provisions shall forever be a county road, and "the duty of keeping the same in repair devolves upon the Fiscal Court of the county to be maintained out of the general county fund as provided by law, and all other powers and duties respecting such road shall be imposed upon and invested in the said Fiscal Court."

This act refers to state aid roads, which constitute only a small per cent of the county roads. The expense of maintaining the roads not aided by the state is, of course, a county matter.

It is thus quite clear that the taxation imposed by the Fiscal Court of a county for the purposes of constructing or reconstructing roads is a county expenditure, and not a state indebtedness, and, consequently, that the school tax decision has no bearing upon the question.

The demurrer to the answer is sustained, and if the defendants do not answer further, or manifest a desire to do so, judgment, as prayed for, will be entered.

Walter Evans,
Judge.

JUDGMENT.—Filed May 29, 1916, Walter Evans Judge.

This case having come on for hearing upon the demurrer of the plaintiff to the answer, as amended, of W. T. Hendrickson, county judge; Ruel Eads, T. E. Wise, James Jones, Asbury Miller, William Bennett and L. Morgan, constituting the Fiscal Court of Taylor county, and having been argued by counsel for complainant, and counsel for defendants, and the court being sufficiently advised, delivered its opinion in writing, which is filed, and pursuant thereto it is ordered and adjudged that said demurrer be sustained, to which the defendants excepted.

And the defendants declining to plead further, the case came on for hearing upon the motion for mandamus and in chief, and the court being fully advised, it is considered and adjudged that said motion be sustained, and that the defendants, W. T. Hendrickson, county judge; Ruel Eads, T. E. Wise, James Jones, Asbury Miller, William Bennett and L. Morgan, and their successors in office, if any, justices of the peace of Taylor county, said defendants together constituting the Fiscal Court of said county, be, and they are hereby, ordered to convene said court at the county seat of Taylor county on the 20th day of June, 1916, at which time they are ordered to proceed to make a levy upon all of the property which is now assessed for and subject to taxation for state revenue purposes, said levy being sufficient to pay off one-third f the judgment heretofore obtained by this plaintiff against Taylor county, to wit, first, the sum of $15,606.31, with interest from the 1st day of April, 1914, until paid; second, the sum of $31.45 costs of the original action against Taylor county, together with the sum of $3.45 costs heretofore accrued in this suit; and shall cause the bills therefor to be placed for collection in the hands of the sheriff of Taylor county.

It is further considered, ordered and adjudged that the said defendants and their successors in office, if any, as the Fiscal Court of Taylor county, be, and they are hereby, ordered in the year 1917 to make a levy upon all the property in said Taylor county which is then assessed for and subject to taxation for state revenue purposes for said year's taxes, sufficient to pay another one-third of the said judgment heretofore obtained by this plaintiff against Taylor county, together with another one-third of the costs of the original action against Taylor county, and one-third of the accrued costs in this suit, for the purpose of paying said portion of said judgment. And it is further ordered that said last mentioned levy be made at the same time and by the same order by which

all other taxes levied by said Fiscal Court for the year 1917 are levied.

It is further ordered and adjudged that the said defendants and their successors in office, if any, as the Fiscal Court of said Taylor county, be, and they are hereby, ordered in the year 1918 to convene said court at the county seat of Taylor county and make a levy upon all of the property which is then assessed for and subject to taxation for said state revenue purposes for said year's taxes, sufficient to pay the remaining one-third of the said judgment heretofore obtained by this plaintiff against said Taylor county, together with one-third of the cost of the original action against Taylor county and one-third of the accrued costs in this suit, for the purpose of paying said portions of said judgment and costs. And it is further ordered that said last mentioned levy be made at the same time and by the same order by which all other taxes levied by said Fiscal Court for the year 1918 are levied.

It is further ordered and adjudged that said defendants and their successors in office, as the Fiscal Court of Taylor county, be, and they are hereby, ordered to place the tax bills for each of the aforesaid levies for collection in the hands of the sheriff of Taylor county, and his successor in office, if any; and upon default of said sheriff to execute bond and qualify for said office, then W. T. Hendrickson, county judge, and his successor in office, if any, constituting the County Court of said county, is directed when he next appoints a collector whose duty it shall be to collect any or all items of any levy made, or which may hereafter be made by the Fiscal Court of Taylor county for any purpose, to embrace in said order of appointment a direction to such officer appointed to collect both the levy made or which may hereafter be made, to pay this judgment, and the levy made or which may hereafter be made for any and all items which are levied or which may be levied by said Fiscal Court; and said county judge, acting as said County Court, shall continue to so embrace such directions in the same order of appointment until a collector is appointed who shall qualify as such collector by executing proper bond; and said county judge shall exact of him but one and a single bond to collect the levy made, or which may herafter be made to pay this judgment as aforesaid, and the item or items for any levy made, or which may hereafter be made by said Fiscal Court for any other purpose, except he shall exclude from the same any levy made by the Fiscal Court of Taylor county for

school purposes, and also the five cents on each one hundred dollars of state revenue for the construction of public roads, as provided for by Sect. 4356x, Sub-sect. 4 of the Kentucky Statutes. And said defendant and his successors in office, if any, shall continue so to do until this plaintiff's said judgment and the costs as aforesaid have been paid in full.

It is further ordered and adjudged that the defendants herein, and their successors in office, if any, together constituting the Fiscal Court of said Taylor county, shall assemble as such once in every three months and order and have paid to this plaintiff through its attorneys, Richards and Harris, of Louisville, Kentucky, such a proportion of all money that may come into the hands of the treasurer of said Taylor county, or into the hands of any other official or person from taxes levied by said court, as the rate of taxation levied, or which may be levied, to pay this plaintiff's judgment, or the portion thereof for which a levy or levies may have been made at said time, bears to the rate of taxation levied by said court for all purposes; and they shall continue so to do until the plaintiff's judgment has been satisfied.

This cause is reserved and retained on the docket of this court for the purpose of entering such orders and of taking such proceedings as may be necessary or proper to enforce the levy and collection of the taxes herein provided for.

To all and each part of this order the defendants and each of them excepts.

ASSIGNMENT OF ERRORS.—Filed June 27, 1916.

Defendants herein complain that the court, in trying and determining the above styled cause, erred to the prejudice of defendants as follows:

1. In sustaining the demurrer to the answer of defendants.

2. In holding that the amendment made by the legislature of Kentucky in 1906 to Section 4131 of the Kentucky Statutes, as it previously existed, would, in enforced, impair the obligation of the contract between plaintiff and Taylor county, and is unconstitutional.

3. In commanding the defendant, W. T. Hendrickson, as county judge of Taylor county, and any successor in said office, whenever a collector of any tax levied, or which may hereafter be levied, by the Fiscal Court of said county (except school taxes), is appointed, to embrace in the order of appointment of said collector that he shall be required to collect the taxes levied, or to be levied, to pay plaintiff's judgment, and shall execute one bond for the collection of all taxes levied by the Fiscal Court, including the taxes levied to pay plaintiff's judgment; and in commanding said county judge, and his successors in office, to continue so to do until plaintiff's judgment and his costs have been paid in full.

4. In refusing to exclude from the taxes which the colector apointed to collect the taxes to pay plaintiff's judgment and other county taxes is required to collect. and for which he is required to give bond, taxes levied by Taylor county for the purpose of helping to build and maintain the public roads of Taylor county which are being constructed pursuant to the provisions of Section 4356w of the Kentucky Statutes, 1915 edition, being an act entitled "An act declaring certain public roads a system of public state highways, and public works of the state of Kentucky," approved March 24, 1914, and Section 4356w of the Kentucky Statutes, 1915 edition, being an act entitled "An act to create and establish a system of public state roads and to provide for the construction and maintenance thereof," approved March 24, 1914.

5. In refusing to exclude from the taxes which the collector appointed to collect the taxes to pay plaintiff's judgment and other county taxes is required to collect, and for which is required to give bond, taxes levied by Taylor county for the purpose of building and maintaining the public roads of Taylor county.

6. In controlling the discretion which the county judge of Taylor county has by the Statutes of Kentucky, as construed by the Court of Appeals of Kentucky in appointing collectors of revenue, and in refusing to allow said county judge to fix and name, as he might deem proper, in the order appointing each collector of taxes, what taxes such collector should collect, and for which he should give bond.

7. In ordering that the defendants and their successors

in office, constituting the Fiscal Court of Taylor county, should once in each three months, or at all, order and have paid to plaintiff on his judgment such portion of said taxes levied by said court as the rate of taxation levied to pay plaintiff's judgment, or the portion thereof for which a levy or levies have been made at said time, bears to the rate of taxation levied by said court for all purposes.

Wherfore, defendants pray that the judgment entered in the above styled cause on May 29, 1916, be reversed.

Abel Harding,
Helm Bruce,
Attorneys for Defendants.

BOND.—Filed June 27, 1916.

Know all men by these presents, that we, W. T. Hendrickson, judge of the Taylor County Court, Kentucky, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, justices of the peace of Taylor county, Kentucky, principals; and Maryland Casualty Company, surety, are held and firmly bound unto Sterling Land & Investment Company, in the sum of two hundred ($200.00) dollars, to be paid to said Sterling Land & Investment Company or its executors or administrator, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our heirs, executors and administrators.

Sealed with our seals and dated this 27th day of June, A. D. 1916.

Whereas, the above named W. T. Hendrickson, J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, have prosecuted a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment rendered in the

above styled cause by the District Court of the United States for the District of Kentucky at Louisville.

Now, therefore, the condition of this obligation is such, that if the above named W. T. Hendrickson, J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, shall prosecute their said writ of error to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

W. T. Hendrickson,
J. D. Jones,
W. H. Bennett,
A. W. Miller,
L. Morgan,
Ruel Eads,
T. E. Wise,

All the foregoing by Helm Bruce, Atty.

Maryland Casualty Compasy,
C. W. Jefferson, [Seal]
Attorney-in-Fact.

Approved June 27th, 1916.
Walter Evans,
Judge.

ORDER ALLOWING ASSIGNMENT OF ERRORS AND WRIT OF ERROR.—June 27, 1916.

This day came the defendants in the above styled cause and tendered their assignment of errors and their petition for a writ of error from the United States Circuit Court of Appeals, and it is now ordered that said assignment of errors be filed and said writ of error be allowed, upon the execution of a bond in the sum of two hundred dollars, not to operate as a supersedeas. Thereupon appeared the defendants and tendered said bond

n the sum of two hundred dollars, with the Maryland Casualty Company, of Baltimore, Maryland, as surety, which bond is hereby approved and ordered filed.

PRAECIPE FOR TRANSCRIPT—Filed June 28, 1916.

The clerk will copy into the transcript on the writ of error herein the following papers, to wit:

1. The petition for mandamus;
2. The amended petition, filed May 6, 1916;
3. The amended and supplemental petition, filed May 29, 1916.
4. The answer and the first and second amended answers;
5. The demurrer;
6. The opinion of the court, filed May 29, 1916;
7. The judgment of the court;
8. The assignment of errors;
9. The petition for writ of error;
10. The appeal bond;
11. The citation and return thereon;
12. This praecipe.
13. Order allowing writ of error and approving bond.

Helm Bruce,
Atty. for Defts.

Service of praecipe accepted this June 28, '16.

W.O. Harris, Jr.,
Atty. for Deft. in Error.

CLERK'S CERTIFICATE.

I, A. G. Ronald, clerk of the District Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 34 pages contain a true and correct transcript of the record and proceedings in the case of W. T. Hendrickson et al. vs. Sterling Land & Investment Company, Number 192, copied in accordance with the praecipe to be found on page 34 of this record, as the same appears from the files and records in my said office.

Witness my hand and the seal of said court this 11th day of July, A. D. 1916.

[Seal] A. G. Ronald,
Clerk.

[Ten-cent revenue stamp attached.]

PETITION FOR WRIT OF ERROR—Filed June 27, 1916.

Defendants, W. T. Hendrickson, judge of Taylor county court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, justices of the peace of Taylor county, and, with said judge of the county court, constituting the Fiscal Court of Taylor county, do hereby petition the court for a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to bring in review before that court the judgment entered in the above styled cause on May 29, 1916, and the record therein.

Helm Bruce,
Atty. for Defendants.

Allowed June 27, 1916.
Walter Evans, Judge.

CITATION.

United States of America, Western District of Kentucky, Sixth Judicial Circuit, ss.:

To Sterling Land & Investment Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit on the* 25th day of July next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Kentucky, wherein W. T. Hendrickson, Judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, Justices of the Peace of Taylor County (Kentucky), plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this twenty-seventh day of June, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America the one hundred and fortieth.

[Seal] Walter Evans, Judge.

Service of above citation accepted this June 28, 1916.

W. O. Harris, Jr.,
Attorney for Defendant in Error.

CITATION WRIT OF ERROR.

The United States Circuit Court of Appeals for the Sixth Circuit. The United States of America, Sixth Judicial Circuit, ss.:

The President of the United States, to the Honorable Judge of the District Court of the United States for the Western District of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said

district court, before you, or some of you, between Sterling Land & Investment Company, plaintiff, and defendants W. T. Hendrickson, Judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, Justices of the Peace of Taylor County (Kentucky), a manifest error hath happened to the great damage of the said defendants as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you may have the same at Cincinnati, Ohio, in said circuit, on the 25th day of July next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States this 27th day of June, A. D. 1916, and in the one hundred and fortieth year of the Independence of the United States of America.

Allowed by

Walter Evans,

United States District Judge.

[Seal] A. G. Ronald,

Clerk of the District Court of the United States for the Western District of Kentucky.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

APPEARANCE OF COUNSEL—Filed July 28, 1916.

William C. Cochran,
Clerk of said Court:

Please enter my appearance as counsel for the Plaintiffs in Error.

Helm Bruce.

MOTION TO ADVANCE CAUSE—Filed Oct. 3, 1916.

Plaintiffs in error in each of the above entitled causes file duly accepted notice to counsel for defendants in error therein, and move the court to advance each of the said causes for an early hearing and decision on account of the public interest in the questions therein involved, and file an affidavit in support of the motions.

Bruce & Bullitt,
Attys. for Plffs. in Error.

AFFIDAVIT IN SUPPORT OF MOTION TO ADVANCE—Filed Oct. 3, 1916.

AFFIDAVIT OF W. T. HENDRICKSON.

W. T. Hendrickson, being duly sworn, and in support of a motion to advance the five above entitled causes for hearing, says:

I am the Judge of the Taylor County Court (of Kentucky), and one of the plaintiffs in error in each of the said causes.

I have honestly and in good faith endeavored to obey and carry into execution the judgment of the United States District Court in each of said causes; and the other members of the Fiscal Court of Taylor County have done likewise.

Said Fiscal Court, of which I am ex officio a member as County Judge, and am the presiding officer, did, on June 20, 1916, in obedience to the judgment in each of said causes, levy an ad valorem tax on all the property in Taylor County subject to taxation, sufficient to pay the amounts required by said judgments to be paid.

On the same day, to-wit, June 20, 1916, the office of sheriff of Taylor County being vacant, and there being no collector for taxes, except State taxes, in Taylor County, the Taylor County Court, of which I was, and am, the Judge, made an order appointing Robert L. Faulkner collector of taxes, other than State taxes, and ordered him, in conformity with the judgment of said court in each of said causes, before entering upon his duties as collector, to make and enter into one single bond, conditioned that he would collect and properly account for the taxes levied, in obedience to the judgments in said causes, and also all taxes, except that levied for schools, under the levy made by the Fiscal Court for the general purposes of the county, all in strict obedience to, and in exact conformity with the order of the said District Court in each of said causes.

Said Faulkner was, and is, a reputable and responsible man of considerable wealth, and one of the best and most influential citizens of Taylor County. And I have understood that he is in favor of paying Taylor County's bonded debt, or such part of it as the county is able to pay. But said Faulkner failed and declined to give bond, or to qualify as collector aforesaid.

After the refusal of said Faulkner to accept said office of collector, or qualify himself to fill it, the County Court

at its August term, to-wit, August 10, 1916, the office of sheriff still being vacant, and there being no collector of taxes, except State taxes, made an order appointing E. N. Tucker collector of taxes, other than State taxes, and directed him, in conformity with the judgment of the court in each of said causes, to execute one single bond for the collection of the taxes levied to pay said judgments, and also to collect the taxes levied for general county purposes.

Said Tucker is also a substantial man, and one of the leading citizens of Taylor County, and understood to be in favor of paying the bonded debt of Taylor County, or such part of it as the county can pay. But said Tucker failed and refused to accept the office, or to qualify himself to fill the same by executing the bond required of him.

I have at all times been willing, and am now willing, as Judge of the Taylor County Court, to appoint any reputable man who may be recommended to the office of collector of taxes in Taylor County, and who may be suggested as being willing to accept said office and qualify by executing the character of bond required by the order of the court in said cases. But no such man has been recommended to me, other than those I have heretofore appointed, as aforesaid, and I know of no one to appoint who, there is any reason to believe, will accept the said office and give the character of bond required.

The result of the impossibility of getting any one to accept the office of tax collector under the conditions required by the judgments in said cases is that no taxes for county purposes of any kind are being collected, or can be collected, in Taylor County, and the public roads and bridges are necessarily being allowed to go unrepaired, and there are no funds to pay for the maintenance of the court house and the jail, and other public properties of the county, or to pay any of the officers of the county for the performance of their official duties.

In other words, the effect of the judgments of the District Court in said cases has been to paralyze the county government of Taylor County, and, at the same time, to accomplish nothing towards the collection of money wherewith to pay any of said judgments.

It is of the utmost importance to Taylor County, and the people thereof, that said causes be speedily heard and determined, so that if it should be decided that the judgments of the District Court therein are erroneous, and that the County Court has a right to appoint a collector

of taxes levied for general purposes, and to permit him to qualify by giving bond for the collection of such taxes, and to appoint a different collector to collect the taxes levied to pay said judgments, as affiant believes the Statutes of Kentucky authorize, this may be speedily done, and the means be thereby procured for carrying on the governmental functions of said county.

W. T. Hendrickson.

Subscribed and sworn to before me by W. T. Hendrickson this 28 day of September, 1916.

M. W. Tucker,
Notary Public, Taylor County, Kentucky.

(Seal)
My commission expires Feby. 16, 1920.

STIPULATION THAT CAUSES BE HEARD TOGETHER—Filed Oct. 28, 1916.

It is hereby agreed between the respective counsel for plaintiffs in error and defendants in error that the five above entitled causes, which involve the same questions, may be heard together.

Helm Bruce for Plffs. in Error.
L. A. Faurest for Elizabeth Creager,
Hugh S. Gardner for Mildred E. Hocker
Defts. in Error.
W. O. Harris, Jr., for Apperson and Sterling Land & Investment Co., Defts. in Error.

Order Entry

ORDER CONSOLIDATING CAUSES FOR HEARING
—Filed Nov. 10, 1916.

Ordered that since the five above entitled causes involve the same questions they shall be heard and submitted in this court together.

ENTRY—CAUSES ARGUED AND SUBMITTED—
Dec. 5, 1916—Before Warrington, Knappen and Denison, C. JJ.

These causes are argued together by Mr. Helm Bruce for the Plaintiffs in Error and by Mr. L. A. Faurest, Mr. W. O. Harris, Jr., and Mr. Lewis Apperson for the Defendants in Error and are submitted to the court.

JUDGMENT—Filed Dec. 15, 1916.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

W. T. Hendrickson, Judge, etc., et al

vs. No. 2951.

Sterling Land & Investment Company.

Error to the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be and the same is hereby affirmed with costs.

OPINION—Filed Dec. 16, 1916.

Filed Dec. 16, 1916, Wm. C. Cochran, Clerk.

Nos. 2947-2951.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

W. T. HENDRICKSON, Judge of Taylor County Court, and J. D. JONES, W. H. BENNETT, A. W. MILLER, L. MORGAN, RUEL EADS and T. E. WISE, Justices of the Peace of Taylor County, Kentucky,

Plaintiffs in Error.

No. 2947 v.

LEWIS APPERSON,

Defendant in Error.

SAME

No. 2948 v.

ELIZABETH CREAGER.

SAME

No. 2949 v.

HUGH S. GARDNER.

SAME

No. 2950 v.

MILDRED E. HOCKER.

SAME

No. 2951 v.

STERLING LAND AND INVESTMENT COMPANY.

ERROR to the District Court of the United States for the Western District of Kentucky.

Submitted December 5, 1916.

Decided December 15, 1916.

Opinion

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

PER CURIAM. It is here sought to reverse five judgments in mandamus. They were rendered in separate cases which involved the same questions and were decided at the same time. The proceedings in error were heard together here and are passed upon in this opinion. The plaintiffs in error constitute the Fiscal Court of Taylor County, Kentucky, and the peremptory order in each case in terms requires them and their successors, if any, in office: (1) to convene the court at stated times in 1916, 1917 and 1918, and to levy a tax upon the taxable property of the county, payable in three annual installments, sufficient in the aggregate to pay certain unsatisfied judgments which the defendants in error had severally recovered against the county; (2) to place the appropriate tax bills for collection under each levy in the hands of the sheriff, and his successor, if any, in office; and, upon failure of the sheriff to qualify, the order in each instance directs (3) the county judge, and his successor, if any, in office, constituting the county court, to take steps necessary to collect such tax when appointing a collector of taxes.

The cases, except as to a road tax, are controlled by the decisions of this court in *Tucker* v. *Hubbert*, 196 Fed. 849, and *Graham* v. *Quinlan*, 207 Fed. 268, unless error was committed, as counsel claim, in the decision in *Graham* v. *Quinlan*. The contention is that we there erroneously construed the decison in *Commonwealth* v. *Moody*, 150 Ky. 571, touching the effect of an amendment made March 15, 1906, to section 4131 of the Statutes of Kentucky. Acts 1906, p. 153 (sec. 3); 2 Ky. Stat., Carroll ed. 1915, sec. 4131(3). The error so claimed concerns a further portion of each order. These orders also provide in substance that when the county judge, or his successor, if any, in office, shall appoint a collector of taxes, he shall embrace in the order of appointment a direction to the officer to collect in addition to the usual levies of taxes also the levies to pay the judgments mer oned, and shall exact of the c ector a single bond to secure collection of all the levies. Each order, however, excepts any levy made by the fiscal court for school purposes, and also "the five cents on each one hundred dollars of state revenue for the construction of public roads."

In *Graham* v. *Quinlan* (at p. 272) we considered the decision in the Moody case, and we do not see any sufficient reason to change the views we there expressed,

either as to that decision or the effect of the amendment of 1906. It is true that the amendment in terms relieves the collector of any duty "to give bond for and collect" taxes not "mentioned or provided for in the order of the county court appointing him." Before the amendment no special certification of the county levy was required to be made to the sheriff or collector in order to make the tax collectible by either; it was the duty of each to take notice of levies made by the fiscal court, and to collect and apply the taxes; and the failure of either to do so rendered the defaulting official responsible under his bond (*Commonwealth* v. *Wade's Adm'r*, 126 Ky. 791, 801). The amendment was in form appropriate to ameliorate this condition at least as to the collector; it relieved him, as well as his sureties, from the peril of overlooking existing levies; but the language fails to indicate any purpose to do more than this, save only to impose upon the county court a duty of certification of levies when appointing a collector. The amendment did not change the purport or effect of any levy itself. A tax levy imports a necessity for its existence and a purpose to collect it. The power to impose a tax would be futile in the absence of effective means for its collection. Upon the sheriff's failure to qualify, the county judge, in his capacity as the county court, is empowered to appoint a collector of taxes; and the amended section, by clear implication, devolves a duty upon the county court exercising this power to provide in its appointing order for the collection of the existing county tax levies. This, as it seems to us, is the natural import and meaning of the amended section in its entirety, and, consequently, is expressive of the legislative intent. It is insisted, however, that the amendment empowers the county court to appoint two or more collectors and to mention or provide for the collection of such taxes, and such only, in the several orders of appointment as the court shall deem fit; and, aside from the road tax before alluded to, this is the effect of the only defense here offered. It is particularly to be noticed that no objection is made to the portions of the peremptory orders that require levies to be made to pay the unsatisfied judgments; the complaint is that the orders collectively, as well as separately, restrict the county court to the appointment of a single collector with a single bond. Certainly the words comprised in the amendment itself do not in terms vest any appointing power. The right to appoint a plurality of collectors of taxes ought to be traceable to some distinct

legislative authority. The only language expressly creating the power of appointment is contained in the old portion of section 4131 and remains unchanged; and, as already indicated, the construction which that language received in the Wade case (126 Ky., at 799), limiting the power of appointment to a single collector to collect the county revenue, including any special assessment, ought to be followed unless the decision in the Moody case requires a different construction. The only issue involved in the Moody case was whether Moody, who had been appointed as a special tax collector after the amendment of 1906, was responsible for failure to collect a tax not mentioned in his order of appointment. Plainly, this did not call for a construction of the appointing power; it concerned only the effect of omission to mention a particular tax in an appointing order. It is clearly to be inferred from the records in the instant cases, not to speak of the records in *Tucker* v. *Hubbert* and *Graham* v. *Quinlan*, that no person would accept an appointment and furnish a bond, with responsible sureties, to collect simply and solely a tax levy to pay these judgments; in short, the logic of the interpretation urged in behalf of plaintiffs in error is to impute to the legislature a purpose to sanction repudiation of acknowledged county indebtedness. We can not accept this view. We can not believe that language appropriate to require certification of tax levies to a tax collector for the protection of himself and his sureties was intended also to justify multiplying collectors and distributing the items of levy among them at the will or the caprice of the appointing official. The complaint at bottom is not that the services in themselves are too great for a single collector; it is that they are affected by the existence of bitter opposition to payment of these unsatisfied judgments. The circumstance that such hostility prevails in a particular county against a single item of its tax levy can not stand as a warrant for severance of the levy. The statute is a general law and must have uniform operation throughout the state. The plaintiffs in error can not be heard both to concede the levy to pay these judgments to be right and affirm its collection to be wrong. Simple justice and good conscience, as also the law, require provision to be made for a single agency and guaranty to collect this tax as a unitary portion of the regular county levy; and if collection of those portions of the levy which the taxpayers are willing to pay can not be effected in this way, the fault must lie with the county itself. Our conclusion, of

course, renders it unnecessary to consider the question determined below whether the effect of the amendment was to destroy an existing remedy, without substituting one equally efficacious, to enforce collection of the judgments, and so operated to impair the contracts.

It remains to consider whether the road tax to which allusion has been made is a state tax and not a county tax. Here again counsel lay stress upon the question of collectorship. If the tax is a county tax, its collection will fall within the province of the county tax collector; but if it is a state tax, its collection must be made through the state tax collector who appears to have been appointed by the county court January 24, 1916. The road tax is one of the items of the general county levy, to-wit:

"That thirty-five cents on each one hundred dollars as assessed and equalized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor County for the year 1916, four thousand six hundred dollars ($4600) be used in connection with like sum from the state for the purpose of continuing the work on the state roads in the aforesaid county, which are now under construction."

It is the item of $4,600 thus provided for that is in dispute. The statutes that are pertinent here were enacted by the legislature of Kentucky on March 24, 1914; and since the first act is dependent for its execution upon the second, the two acts must necessarily be considered together. One is entitled "An act declaring certain public roads a system of public state highways, and public works of the State of Kentucky." The other statute is entitled "An act to create and establish a system of public roads and to provide for the construction and maintenance thereof." Acts 1914, pp. 440, 441; 2 Ky. Stat., Carroll ed., 1915, sections 4356w, 4356x. The first of these acts provides that the system of highways to which it in terms relates shall consist of roads connecting county seats of adjoining counties within the state, and also county seats of state border counties with those of adjoining counties in the adjacent states. The second act invests the commissioner of public roads with general supervision of all public roads and bridges that "are being constructed, improved or maintained in whole or in part by aid of state money," and would seem to include roads designed to connect county seats provided for in the first act (subsections 1 and 2 of second act).

Further provision is made for raising money through taxation for the purpose of furnishing such state aid and for apportioning the money among the several counties applying for state aid. It is not necessary to recite the details of the second act, since it distinctly provides (subsection 21):

"Any road constructed or reconstructed under the provisions of this act shall forever hereafter be a county road and the duty of keeping the same in repair devolves upon the fiscal court of the county to be maintained out of the general county fund as provided by law, and all other powers and duties respecting such road shall be imposed upon and invested in the said fiscal court."

Thus, the plan considered as an entirety would seem to provide for state aid of county roads rather than county aid of state roads. It is true that both of these acts in general terms call the roads there mentioned "public state highways," yet this is consistent with the specific provision, just quoted, which expressly invests every such road with the characteristics of "a county road," and requires their maintenance later by the several fiscal courts of the counties. It was manifestly quite as competent for the law-making body to provide that these highways should each be a county road as it was to provide that they should receive state aid. All public roads are in one sense state highways, since the general rule is to provide for their construction, improvement and repair through local agencies created in pursuance of legislative enactment; but here the purpose to treat these highways as local roads is distinct. It results, we think, that taxes levied as here by county agencies are county taxes and are to be collected by the county tax collectors. We discover nothing in the statutes in question which would prevent any of the counties from securing such state aid under levies and collections of taxes made through purely county agencies. Indeed, the facts alleged in the pleadings of the instant cases and by general demurrer admitted, set out a plan to secure state aid under these statutes through appropriation and use of the $4,600 in dispute. The plan relates to "the improvement of three (named) roads" which are designed to connect the county seat of Taylor County with the county seats of certain adjoining counties. The aid sought is under an arrangement alleged to have been made with its officials whereby the state is to contribute

a like sum ($4,600) for the same object. In other words, the total sum of $9,200 is intended to be secured and applied toward the improvement of these roads. Unless the desired aid is to be obtained in this way, it can not under the present records be secured. If the plan of Taylor County had been to issue bonds under the acts sufficient to procure the total sum desired ($9,200), and to use the money in the improvement of the three roads before applying for state aid, the county might after executing the plan have secured state aid to the same extent as it now proposes, and then have applied the sum so received from the state to ordinary county objects (*Mitchell* v. *Knox County Fiscal Court*, 165 Ky. 543, 550-553); and this tends strongly to support the conclusion that the road tax in question is a county tax and not a state tax. The claim of analogy between the instant tax and an ordinary school tax fails. The road tax originates with the fiscal court, the school tax with the board of education; the object of the road tax is to construct or improve county roads, the object of the school tax is to procure and support an exclusively state system of public schools (*City of Louisville* v. *Commonwealth for School Board*, 134 Ky. 488, 494; *Ramsey* v. *County Board of Education*, 159 Ky. 827, 831, 832).

It follows that the judgment in each of the cases must be affirmed, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of W. T. Hendrickson, Judge, etc., et al., v. Sterling Land & Investment Company, No. 2951, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of February, A. D. 1917.

William C. Cochran,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

(Seal)

UNITED STATES OF AMERICA, *ss.*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which W. T. Hendrickson, Judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, Justices of the Peace of Taylor County, Kentucky, are plaintiffs in error and Sterling Land & Investment Company is defendant in error, No. 2951, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of March, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, *ss.*

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the Record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 31st day of March, A. D. 1917, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

United States Circuit Court of Appeals.

No. 2951.

W. T. HENDRICKSON, Judge of the County Court of Taylor County, Kentucky, Plaintiff in Error,

vs.

STERLING LAND & INVESTMENT CO., Defendant in Error.

Stipulation.

It is hereby stipulated that the certified copy of the transcript of record in the above entitled cause, heretofore filed in the Supreme Court of the United States, with a petition for a writ of certiorari, may be taken as a return to said writ.

W. OVERTON HARRIS,
Of Counsel for Def't in Error.
HELM BRUCE,
Att'y for Pl'ff in Error.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the city of Cincinnati in said circuit this 31st day of March, A. D. 1917.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] File No. 25,808. Supreme Court of the United States. No. 978, October Term, 1916. W. T. Hendrickson, Judge, etc., vs. Sterling Land & Investment Company. Writ of Certiorari. Filed Mar. 29, 1917. Wm. C. Cochran, Clerk U. S. C. C. A., 6th Cir.

[Endorsed:] File No. 25,808. Supreme Court U. S., October term, 1916. Term No. 978. W. T. Hendrickson, Judge, etc., Petitioner, vs. Sterling Land and Investment Co. Writ of Certiorari and return. Filed April 3, 1917.

Office Supreme Court, U. S.
FILED
MAR 7 1917
JAMES D. MAHER
CLERK

No. 978 431

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, Judge of the County Court of Taylor County, Kentucky, - - Petitioner,

versus

STERLING LAND & INVESTMENT COMPANY, - - - - - - - - Respondent.

Petition for a Writ of Certiorari and Brief in Support of the Petition.

HELM BRUCE,
Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SIXTH CIRCUIT.
OCTOBER TERM, 1916.

W. T. HENDRICKSON, ET AL., - - *Plaintiffs in Error,*

versus

STERLING LAND & INVESTMENT COMPANY, - - - - - - *Defendant in Error.*

NOTICE.

Notice is hereby given that on Monday, March 12, 1917, at the opening of court on that day, W. T. Hendrickson, plaintiff in error in the above-entitled cause, will submit to the Supreme Court of the United States in the city of Washington, D. C., a petition for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Sixth Circuit, in said cause; and a copy of said petition, and of the brief in support thereof, is herewith served upon you.

HELM BRUCE,
Counsel for W. T. Hendrickson.

Service of the foregoing notice, and of a copy of the petition and brief therein referred to, is hereby acknowledged, this 21st day of February, 1917.

W. OVERTON HARRIS,
Counsel for Sterling Land & Investment Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, - - *Petitioner,*

versus

STERLING LAND & INVESTMENT COMPANY, - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

W. T. Hendrickson, who is the Judge of the County Court f Taylor County, Kentucky, presents this petition for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Sixth Circuit, to review its judgment in a case wherein that court affirmed a judgment of the United States District Court for the Western District of Kentucky, in a cause wherein respondent herein was plaintiff, and this petitioner and others were defendants, and wherein said District Court granted a mandamus at the instance of respondent against this petitioner.

A certified copy of the entire transcript of the record in said cause, including the proceedings in the said

Circuit Court of Appeals is presented with this petition, as an exhibit thereto.

As shown by a comparison between the opinion of the Circuit Court of Appeals, contained in said record, and the opinion of the Court of Appeals of Kentucky in the case of Commonwealth v. Moody, 150 Ky. 571, there is a direct conflict between them as to the true construction of a statute of Kentucky, regulating, and vitally affecting, county government in the State of Kentucky, and vitally affecting the duties of this petitioner as Judge of the County Court of Taylor County, Kentucky.

THE MATTER INVOLVED.

Respondent is a creditor of Taylor County, Kentucky. Judgment was obtained on the debt against that county in the United States District Court for the Western District of Kentucky, upon which execution was issued, and was duly returned, in substance and effect, "no property found." Respondent then instituted another action in the same court against petitioner as the Judge of the County Court of Taylor County, and against the several Justices of the Peace of that county, which Judge and Justices constitute the Fiscal Court of the county, in which a mandamus was sought against those officers, directing them to levy a tax upon the taxable property in the county, sufficient to pay the judgment against the county. To this part of the prayer for relief there was never any objection on the part of the officers of the county; and when the judgment was entered commanding the levy, it was promptly made.

But respondent (plaintiff therein) prayed for and obtained more than a judgment simply directing the levy of the tax to pay the debt. The facts concerning the additional prayer and the additional relief obtained are as follows:

By the Statutes of Kentucky the sheriff of a county is the collector of both State and county taxes in his county. But in Taylor County, owing to an unfortunate condition of affairs, there has been no sheriff for many years. In this contingency, the statute makes it the duty of the County Court to provide for the collection of taxes by appointment of a collector, or collectors.

The statute in question is §4131 of the Kentucky Statutes (Edition of 1915), and is as follows:

> "§4131. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the County Court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, or it may appoint a collector for the county of all moneys due the State, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the State, county or any taxing district thereof during the vacancy in the office of sheriff; and in the event the County Court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required of the sheriff, to be approved by the County Court, and if the bond be not executed within said time the appointment of another collector may in like manner, be made and qualified; but such collector shall only be required to give bond for and collect

such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

The Court of Appeals of Kentucky, in the case of Commonwealth, etc., v. Moody, 150 Ky. 571, in construing the statute just quoted, has held that the County Court can, if it sees proper, appoint two, or more, collectors for taxes due the county, specifying in each order of appointment just what taxes are to be collected by the appointee therein named, and taking from each appointee a bond to collect the taxes specified in his order of appointment; that the County Court may, therefore, appoint one collector to collect taxes levied for ordinary county governmental purposes, and take from him a bond to collect those taxes, and a different collector to collect taxes levied to pay the debts of the county, and take from him a bond to collect those taxes.

But the respondent herein, in the petition filed in the District Court, relying upon two opinions in cases formerly decided by the United States Circuit Court of Appeals for the Sixth Circuit, in which a different view was taken as to the construction of this statute, prayed for an order commanding the County Judge that, when he should next appoint a collector, whose duty it should be to collect *any* county tax, levied for *any purpose*, he should embrace in that order of appointment a direction to the appointee to collect *the levy made to pay plaintiff's judgment*, and the levy made to pay any other item of county tax, and further commanding the County Judge to take from such appointee "*but one and a single bond*

to cover the collection of the levy made to pay this judgment, as aforesaid, and the item or items of any levy made by the Fiscal Court of Taylor County *for any other purpose*" (Rec., 4).

Petitioner, as defendant to that action, answered to the effect that, under the statute of Kentucky, as construed by the Court of Appeals of Kentucky, "the County Court of Taylor County has a discretion as to whether it will appoint one person to collect all moneys due the State and the county, and taxing districts therein, or as to whether it will appoint separate collectors and designate in the order of appointment of each collector what he shall collect, including the right and discretion to appoint one collector to collect taxes levied by the Fiscal Court of the county for ordinary county purposes, and another collector to collect taxes levied by the Fiscal Court for other purposes, such as the payment of judgments against the county, and to direct in each order of appointment what taxes the appointee thereunder shall collect, and for the collection of which he should be required to give bond." And he submitted that the United States District Court could not, by its judgment, control the discretion of the County Court of Taylor County, given it by the Statutes of Kentucky as construed by the Court of Appeals of that State (Rec., 6).

A demurrer to the answer was sustained, whereupon the petitioner declined to plead further, and a judgment was entered, in conformity with the prayer of the petition, in effect requiring petitioner, when he, as Judge of the Taylor County Court, should next appoint a collector

to collect *any county taxes* which had been levied by Taylor County, to provide in the order appointing such collector, that he should collect the taxes which had been levied *to pay the judgment of plaintiff* in said action (the present respondent); and that petitioner should take from such collector *but one bond covering the collection of all county taxes.*

Several other actions of exactly similar kind were brought at the same time with the action of the respondent herein; and in each of them the same character of judgment was entered, which was affirmed by the United States Circuit Court of Appeals; and a petition for a writ of certiorari is being presented by this petitioner in each of said causes, contemporaneously with the presentation of this petition.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner, as Judge of the Taylor County Court, is in this position:

Under the opinion of the Court of Appeals of Kentucky, the highest court of that State, he has the right to appoint a collector of taxes levied by Taylor County for ordinary governmental purposes, such as keeping up the court house and the jail, etc., and to appoint a different collector to collect taxes levied to pay any judgments that may exist against the county. And if he has difficulty, and thereby delay ensues, in finding a person who will accept the office of collector for *all taxes,*

and give a bond to collect them, it is the *right and duty* of petitioner, as such County Judge, to proceed promptly to appoint a collector for the ordinary county taxes, to pay the current expenses of the county government, so that the laws may be executed, and to proceed further to appoint a collector to collect taxes for the purpose of paying judgments against the county, just as soon as a person can be found who will accept the appointment and execute the proper bond.

But, under the judgment of the United States District Court, affirmed by the Circuit Court of Appeals, petitioner, as County Judge of Taylor County, is forbidden to take the course above stated, and is commanded, in effect, not to appoint any collector to collect any county taxes, for any purpose, until a suitable person can be found who will undertake to collect not only the usual taxes levied by the county for current expenses, but also those necessary to pay the judgments against the county entered in the United States District Court, and who can, and will, give a proper bond for the collection of all such taxes.

And petitioner has in fact experienced great difficulty in finding, and in fact thus far has not been able to find, any one who will accept the office of county tax collector, and give the bond required by the judgments of the said court; though he has diligently and in good faith tried to find one. And the result of this is that, pending this delay, no taxes of any kind can be collected for the administration of the affairs of the county; although, under the law as construed by the Court of Appeals of Ken-

tucky, petitioner, as County Judge, has the right, and it is his duty, to proceed promptly to cause the taxes necessary for the current administration of the county government to be collected, without waiting until some one can be found who will undertake to collect the taxes and execute the bonds required by said judgments of the District Court.

Petitioner submits, therefore, that a writ of certiorari should be granted by this, the Supreme Court of the United States, to said United States Circuit Court of Appeals for the Sixth Circuit, so as to bring before the Supreme Court the said cause, and the said controversy, and thus enable it to settle the law upon a matter which is absolutely vital to the administration of the law, and the exercise of the functions of government, in Taylor County, Kentucky, and as to which there is a conflict between the decisions of the Court of Appeals of Kentucky and the United States Circuit Court of Appeals, both of which are the law to this petitioner, as an official of the State of Kentucky, and of the County of Taylor.

WHEREFORE, W. T. Hendrickson, Judge of the County Court of Taylor County, prays that a writ of certiorari may be issued to the United States Circuit Court of Appeals for the Sixth Circuit, commanding it to transmit to this court the record in the cause aforesaid, that it may be reviewed as provided by law.

HELM BRUCE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION.

The legislative and judicial history of the subject of this controversy, stated as briefly as we can present it, is as follows:

The present statute governing the appointment of tax collectors, being Kentucky Statutes, §4131, which is quoted in full in the petition for certiorari, is the result of an amendment made in 1906 to a pre-existing statute. The amendment consisted simply of the addition of the last three lines as they are now found in the statute as quoted in the petition, to-wit:

> "But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

In a case, the facts of which arose prior to the amendment of 1906, though it was decided by the Court of Appeals of Kentucky subsequent to that date, to-wit, in the case of Commonwealth v. Wade, 126 Ky. 791, the Court of Appeals of Kentucky held that while a County Court had the power to appoint one collector for State taxes, and a separate collector for county taxes, it had no power to divide the county taxes and to appoint one collector to collect the regular revenue of the county and another collector to collect special assessments necessary to pay debts of the county (126 Ky. 799). This case was decided by the Court of Appeals of Kentucky in October, 1907, upon a state of facts which arose prior to 1906, and which

were, therefore, controlled by the statute as it existed prior to the amendment of 1906. In this Wade case, the court construed the old statute as we have just stated, and held, further, that the appointment of a special collector for the collection of any particular part of the county taxes less than the whole was *absolutely void,* for want of any authority in the County Court to make such an appointment. In that case, as appears from the opinion, Wade had been made regular collector of taxes for both State and county purposes, and had accepted the appointment and qualified for both positions by executing bonds in *January, 1902* (page 795). Subsequent to his appointment and qualification, the Fiscal Court of the county made a special levy to pay a certain obligation of the county, and at the time of making the special levy, it appointed a special collector, one Trotter, to collect the taxes thus levied; but Trotter did not qualify as special collector, and Wade did not collect the taxes, claiming that it was not his duty to collect them. As to Trotter's appointment, the court held it was absolutely void, saying:

> "The nomination of W. B. Trotter as collector by the Fiscal Court was void for want of authority to make it." (Pages 799, 800.)

And the court also held that it was the duty of Wade, under his appointment made in January, preceding the special levy, to collect the special levy, and that having failed to do so, his bondsmen were liable.

In the meantime, after the controversy had arisen, out of which the Wade case grew, though before it was de-

cided by the Court of Appeals of Kentucky, the statute was amended, as we have heretofore stated.

The next step was the decision of the case of Tucker v. Hubbert, 196 Fed. 849, by the United States Circuit Court of Appeals for the Sixth Circuit, which was decided *June 4, 1912*, which was subsequent to the amendment, and upon facts which arose subsequent to the amendment. And in that case the Circuit Court of Appeals, adopting the construction of the *original statute* which the Court of Appeals of Kentucky had placed upon it in the Wade case, held further that the amendment of 1906 *had not changed the law as to the County Court's power of appointment*, and that it still had the power to appoint *only one collector of county taxes* and must require of him just *one bond to cover all county taxes.* As just stated, this case of Tucker v. Hubbert was decided June 4, 1912.

A few months subsequent to the decision of Tucker v. Hubbert by the United States Circuit Court of Appeals, the Court of Appeals of Kentucky, on November 14, 1912, decided the case of Commonwealth v. Moody, 150 Ky. 571. And in this case the Kentucky Court held that the amendment of 1906 *had changed the law as to the County Court's power of appointment*, and that the very purpose of the amendment was to change the statute, as construed in the Wade case. It is true the Kentucky Court made a mistake in dates, saying, in substance, that the amendment of 1906 was doubtless passed to meet the Wade case, whereas the amendment was really passed before the Wade case was decided; the court failing to

note the fact that, while the Wade case dealt with the law as it existed prior to the amendment, and said nothing about the amendment, it was in fact decided after the amendment was passed. This, however, does not alter the fact, but rather emphasizes the fact, that the Court of Appeals in the Moody case held, that the effect of the amendment of 1906 was to change the law as construed in the Wade case. In the Moody case the court used this language:

> "The case of Commonwealth v. Wade's Administrator, *supra,* construed Section 4131 and other sections of the statutes *as they existed prior to the amendment of Section 4131 in 1906,* as Wade's delinquencies referred to in that opinion, occurred before the amendment, and the statute *was then construed as allowing* BUT ONE COLLECTOR *of county or district revenue.* It was further held in that opinion that it was not necessary to certify the taxes to be collected, to the collector; that the collector took the place of the sheriff and was responsible for the collection of all taxes levied during his term of office. As stated, in view of this construction of the statute, *the Legislature authorized the appointment of special collectors* and provided specifically that such collector should give bond for and collect *only such revenue as the order of appointment directed him to collect.* It is not for this court to pass upon the propriety or impropriety of this legislation. The legislative department of the State had a right to enact it" (page 574).

This language is unmistakable in its meaning. It contrasts the law before the amendment and after the amendment, and the *power of the County Court* before the amendment and after the amendment, saying that be-

fore the amendment the County Court had the power to appoint *but one collector of county taxes,* but that by the amendment the Legislature authorized the appointment "of *special collectors* and provided specifically that such collector should give bond for and collect only such revenue as the order of appointment directed him to collect."

And the court, having construed the statute in this way, then took up the argument, which had been urged upon it, that the statute, as thus construed, is unconstitutional, as being in violation of the contract between the county and its creditors, and held that the statute as thus construed by it is not unconstitutional, but is a valid exercise of power.

Promptly after the delivering of this opinion, the Commonwealth (which was suing for the benefit of a creditor of Taylor County) filed in that case what it called a "Petition for Rehearing and Modification of Opinion," in which it called to the attention of the court the opinion of the United States Circuit Court of Appeals in Tucker v. Hubbert, 196 Fed., *supra,* wherein that court had reached a different conclusion as to the meaning and effect of the amendment of 1906; and the petition urged the Court of Appeals of Kentucky to adopt that construction of the statute as amended, suggesting that the *judgment* of the court exonerating Moody and his sureties might be allowed to stand, on the ground that the particular order appointing him collector for that year excluded the taxes to pay the judgment in question, but urging that the *opinion construing the statute* be changed to conform to that of the Circuit Court of Appeals in

Tucker v. Hubbert, so that *next year,* when it should come time to appoint a collector, a mandamus might be obtained in the State Court, as had been granted in the Federal Court, commanding the County Court to appoint *but one collector for all county taxes* and to require of him *but one bond to cover all.* And the petition concludes with an earnest appeal

> "to give to these many creditors of Taylor County *living in Kentucky* the same opportunity to have their debts collected by a future regular collector of county revenue, *as the Federal courts have given to non-residents of Kentucky.*"

The court, however, overruled the petition and refused to change either its judgment or its opinion, thus leaving them to stand as the law of Kentucky, controlling upon all courts of Kentucky.

Next in point of time came the decision of the United States Circuit Court of Appeals in Graham v. Quinlan, 207 Fed. 268, which went up from *Green County,* Ky., and was decided June 30, 1913, a few months after the Moody case. In Graham v. Quinlan, the Circuit Court of Appeals followed its preceding opinion in Tucker v. Hubbert, *supra,* briefly referring to the Moody case, and saying of it:

> "We are *not convinced* that the case of Commonwealth v. Wade's Adm'r, 126 Ky. 791, which held that only one collector could be appointed, etc., was intended to be modified by the decision in Commonwealth v. Moody, 150 Ky. 571";

and briefly stating again the court's own reason for still thinking that its original construction of the amendment of 1906, as adopted in its former opinion in Tucker v. Hubbert, was correct.

Then came the present case, decided by the Circuit Court of Appeals, in which in a *"per curiam"* opinion it simply followed its two preceding decisions in Tucker v. Hubbert, and in Graham v. Quinlan.

It is difficult to say, with certainty, how the court, in the present case, means to dispose of the Moody case. It is not clear whether the court means to say that the Court of Appeals of Kentucky, in the Moody case, did not construe the statute as we have heretofore said it did, or whether it means to say that it did construe it in that way, but that it was a dictum, and that it declines to follow the same for that reason.

On this subject we may remark that the Court of Appeals itself certainly did not consider that its language in construing the statute was a dictum, because it not only construed it, as shown by the language we have quoted above, but then took up the question of the constitutionality of the statute, as thus construed, and decided that the statute, as thus construed, was constitutional, which surely the court would never have done, if it had not felt called on to do so, as that court has always followed the practice, which every court follows, of not deciding a constitutional question unless required so to do. And furthermore, as we have seen, it refused to modify the opinion, when urged to do so in order that the law and the remedies applicable to residents of Ken-

tucky might be the same in the courts of Kentucky as those applicable to non-residents of Kentucky in the Federal courts.

And we may further remark that in the case at bar, the United States *District* Court followed the *construction* of the statute given by the Court of Appeals of Kentucky in the Moody case, but, feeling itself not bound by the views of the Kentucky Court on the *constitutionality* of the statute, held that the statute, as construed by the court in the Moody case, was unconstitutional, as being an attempt to violate the obligation of a contract (Rec., 13, 15).

And while it may not be necessary at the present time to make any elaborate argument as to the true construction of the statute, to determine whether the Court of Appeals of Kentucky is correct, or the United States Circuit Court of Appeals is correct, yet we can not refrain from calling attention to the fact that, while the amendment may have been awkwardly worded to accomplish the change in the law which the Court of Appeals of Kentucky thought it did accomplish, yet from a reading of the language of the amendment, it is very difficult to escape the conviction that the Legislature of Kentucky did mean by this amendment to do exactly what the Court of Appeals of Kentucky in the Moody case says it did. Under the pre-existing statute, as construed in the Wade case, there was no power at all in the County Court to appoint a collector for *less than the whole* of the county taxes. It was bound to appoint a collector for the whole taxes, or for none at all. And, as ex-

pressly held in the Wade case, an order appointing a collector for less than the whole was absolutely void for want of power in the County Court to make it. But this amendment manifestly means to recognize the power of the County Court to appoint a collector for less than the whole of the county taxes; for it expressly says that "such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him." This plainly implies that such collector *shall be required* to give bond for, and *shall have the power to collect*, and shall collect, *such taxes as the order specifies, whatever they may be.* But, if the County Court still, as theretofore, has no power to make an order appointing him to collect less than the whole, the order would be void, and would vest no right or power in him, and he would be a trespasser if he undertook to collect taxes under such an order. And the fact that the statute does not so treat him, but treats him as authorized to collect, to whatever extent the order specifies taxes to be collected by him, shows that the amendment was intended to *recognize the power of the County Court to make such an order;* for if the order is valid, and the appointee has the right to act under it, the County Court *has the power to make it.* And if the court *has the power* to make it, then, manifestly, no court, Federal, or otherwise, has any right to control the discretion of the County Court as to whether it will make such an order, or not.

Think of the extraordinary situation in which the construction now adopted for this statute places a county.

The regular collector is appointed in January of each year. The order appointing him must specify the particular taxes he is to collect. He is authorized to collect no others, and his bond covers none other. Suppose during the next month, February, the court house burns down, or a great freshet washes away all the bridges in the county, or some other public misfortune comes. A special tax may be *levied* to meet the emergency, but, under the present construction of the statute, there is no power to appoint a *collector* to *collect it*, for this would be less than the whole of the taxes for that year, and there is no power, they say, to make such an appointment. The regular collector, as we have seen, would not be required to collect it, nor would his bond cover it, because not specified in the order appointing him. There would be absolutely no means, therefore, by which the county could collect a dollar to meet such a situation until possibly nearly a year after the emergency had arisen.

The statutes of Kentucky were never intended to have any such effect, and the Court of Appeals of the State has so held.

We suppose it is not necessary, and possibly would not be appropriate, at the present time, to discuss the *constitutionality* of the statute as construed by the Court of Appeals of Kentucky. We feel very confident that we can uphold it. The amendment of 1906 made absolutely no change in any right or remedy theretofore existing, except that instead of all county taxes being collected, as theretofore, by one collector, the amendment allowed the County Court to appoint two, or more, col-

lectors; the duty to appoint, and the duty to collect, and the means afforded for forcing collection, remaining absolutely unchanged. But, without entering into the detail of the argument at present, we simply submit that, as the Court of Appeals of Kentucky has held the statute to be constitutional, the question is surely worthy of argument before the statute is condemned.

We therefore ask that the writ of certiorari be granted, and the cause brought here, that the important question involved may be settled by this the only tribunal that can settle it.

HELM BRUCE,
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
DEC 12 1917
JAMES D. MAHER
CLERK

No. [illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

W. T. HENDRICKSON, Judge of the County Court of Taylor County, Kentucky, - - Petitioner,

vs.

STERLING LAND & INVESTMENT COMPANY, - - - - - - - - - Respondent.

Brief for Respondent on Petition for Writ of Certiorari.

A. E. RICHARDS,
W. OVERTON HARRIS,
Counsel for Respondent.

Waverly Press, Inc. Progressive Louisville, Ky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, - *Petitioner,*

versus

STERLING LAND & INVESTMENT COMPANY, - *Respondent.*

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

The litigation which the Petitioner seeks to have reviewed in this court involves the tedious efforts of certain holders of bonds executed by Taylor County to collect judgments rendered upon those bonds. There is no question as to the validity of the bonds themselves, or of the judgments rendered upon them. It is the efforts of the judgment creditor—the Respondent—to collect the judgment that presents the issue raised.

The District Court for the Western District of Kentucky granted a Mandamus directing the Fiscal Court of Taylor County to levy a tax upon the taxable property in the county sufficient to pay the judgment involved in this case. No complaint is made against that part of the order and the levy was duly made. But the order went further and directed the County Judge—the proper

official—that when he next appoint a collector to collect any county tax (except school taxes expressly excepted) levied for any purpose he should embrace in the order of appointment a direction to the appointee to collect the tax levied to pay Respondent's judgment and any other item of the regular county tax levy. And the County Judge was further commanded to take from the collector but one single bond to cover the collection of the levy made to pay both Respondent's judgment and any item of any other levy made by the Fiscal Court for any other purpose. The importance and efficacy of this provision is readily apparent. If it were omitted and the collector allowed to discriminate between various items of the tax levy only those items devoted to the payment of regular county obligations (*e. g.*, county salaries) would be collected and Respondent would be left with an uncollectible tax levy and an unenforceable judgment.

Whether or not the District Court was justified in forbidding a separate collection of separate items of the county levy depends upon the construction of Section 4131, Kentucky Statutes (Carroll's 1915 Edition). That sections reads as follows:

> "Sec. 4131. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the County Court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, or it may appoint a collector for the county of all moneys due the State, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the State, county or any taxing district thereof during the va-

> cancy of the office of sheriff; and in the event the County Court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall within ten days after their appointment, execute bond as required of the sheriff, to be approved by the County Court, and if the bond be not executed within said time the appointment of another collector may in like manner be made and qualified; but such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

The last phrase quoted above was added in 1906 to the previously enacted statute, and it is this phrase which is the bone of contention now.

The section quoted has been construed twice by the Court of Appeals of Kentucky; first, in Commonwealth, *ex rel.*, v. Wade's Administrator, 126 Ky. 791, and again in Commonwealth v. Moody, 150 Ky. 571. It has also been construed twice by the Circuit Court of Appeals for the Sixth Circuit, first in Tucker v. Hubbert, 196 Federal, 849, and again in Graham v. Quinlan, 207 Federal 268.

In Wade's case the Court of Appeals decided that the appointment of a special collector for the special levy made to pay the judgment was void and it remained the duty of the regular collector to collect all taxes for that year "whether State or county, whether regular or special." This decision was based upon facts arising prior to the 1906 amendment to Section 4131, but in Moody's case, *supra*, decided upon facts arising subsequent to the 1906 amendment, it was decided that in view of that

amendment the collector was obligated only for those items of the county levy specifically set out in his order of appointment. The only question before the court was whether Moody was obligated under his order of appointment to collect an item not set out in that order. That was his sole defense, and it was solely upon the determination of that question that the case was decided. Counsel for Petitioner would read into the language of the Moody opinion a decision of another question, viz., the authority of the County Court to appoint separate collectors for separate items of the county tax levy. That question was not before the Kentucky Court for decision, and any such dictum even if hatched from counsel's critical analysis of the language used in the opinion was not binding upon the Circuit Court of Appeals and discloses no diversity of construction of Section 4131.

The Circuit Court of Appeals in Tucker's case, *supra*, referring to the effect of the 1906 amendment upon the opinion in Wade's case decided by the Kentucky Court upon facts arising prior to that amendment said (page 859): "We think the only effect of the statutory amendment relied on to escape that decision is to relieve the collector and his bondsmen from liability for uncollected taxes not covered by the order of appointment."

Moody's case had not then been decided. But in Graham v. Quinlan, 207 Fed. Rep. 268, 272, the Court of Appeals said:

> "We are not convinced that the case of Commonwealth v. Wade's Admr., 126 Ky. 791, 104 S. W. 965, which held that only one collector could be appointed,

> etc., was intended to be modified by the decision in Commonwealth v. Moody, 150 Ky. 571, 150 S. W. 680. The amendment of Section 4131, passed upon in the Moody case, does not purport to change the portion of that section which provides for the appointment of collectors."

Petitioner has not shown his right to the Writ of *Certiorari*. As decided in Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251, 258, the jurisdiction of this court to review judgments of the Circuit Court of Appeals by *certiorari* "is a jurisdiction to be exercised sparingly and only (1) in cases of peculiar gravity and general importance, or (2) in order to secure uniformity of decision." We would insist that this record presents neither a case of peculiar gravity and importance, nor is uniformity of the decisions below lacking. The Circuit Court of Appeals has twice construed the Kentucky statute in a similar manner, and that construction does no violence to the construction placed upon it by the Court of Appeals of Kentucky. We ask that the petition for *certiorari* be denied.

Respectfully submitted,

A. E. Richards,

W. Overton Harris,

Counsel for Respondent.

Office Supreme Court, U. S.
FILED
APR 9 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

No. 978. 431

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY,
Plaintiff in Error,

versus

STERLING LAND & INVESTMENT CO., - *Defendant in Error.*

MOTION.

Plaintiff in error, W. T. Hendrickson, moves the court to advance this cause for hearing, and as ground of such motion says:

By reason of the judgment of the United States District Court in this cause, and of the inability of plaintiff in error to find any one who will accept the office of tax collector under an order pursuant to that judgment, and to give a bond as required by that judgment, no county taxes have been collected in Taylor County since the entry of that judgment on May 29, 1916, and conditions in the county are becoming worse every day. It is therefore of great importance to the county and its citizens, and can be no disadvantage to the defendant in error herein, that this cause should be speedily decided.

In support of this motion reference is made to an affidavit made by plaintiff in error when the cause was pending in the United States Circuit Court of Appeals, found on page 28 of the record. The conditions described in that affidavit still exist.

HELM BRUCE,
Counsel for Plaintiff in Error.

Notice of the foregoing motion,
to be made Monday, April 9,
1917, is accepted:

W. OVERTON HARRIS,
Counsel for Defendant in Error.